

IN THE CIRCUIT COURT OF THE
TWENTIETH JUDICIAL CIRCUIT IN AND
FOR COLLIER COUNTY, FLORIDA

**IMMEDIATE HEARING REQUESTED
PURSUANT TO § 119.11(1) Fla. Stat.**

GINA EDWARDS & ASSOCIATES LLC
dba NAPLES CITY DESK

Plaintiff,

CASE NO.:

v.

DWIGHT BROCK CLERK OF CIRCUIT
COURT, COLLIER COUNTY,
in his official capacity,

Defendant.

**COMPLAINT TO ENFORCE FLORIDA'S PUBLIC RECORDS ACT AND FOR
DECLARATORY, INJUNCTIVE AND MONETARY RELIEF**

The Plaintiff, GINA EDWARDS & ASSOCIATES LLC, *dba* NAPLES CITY DESK, (“Naples City Desk” or “Plaintiff”), by and through the undersigned counsel, hereby sues DWIGHT BROCK CLERK OF CIRCUIT COURT, COLLIER COUNTY, *in his official capacity*, (“Defendant”), and as grounds therefore alleges the following:

1. This action concerns the Defendant’s violation of Plaintiff’s civil rights pursuant to Article I, Section 24 of the Florida Constitution and Chapter 119, Florida Statutes, (the “Public Records Act”).
2. This action seeks declaratory, injunctive, and monetary relief.
3. Specifically, Plaintiff seeks an order declaring the Defendant to be in breach of its constitutional¹ and statutory² duty to permit access to public records, and compelling the

¹ Note Article 1 Section 24, Fla. Const.

Defendant to provide access to the requested public records, enjoining the Defendant from denying access to public records, and awarding Plaintiff attorney's fees and costs. Additionally, Plaintiff requests this matter be expedited pursuant to Section 119.11(1), Florida Statutes³.

Jurisdiction and Venue

4. This Court has subject matter jurisdiction pursuant to Article V, Section 5(b) of the Florida Constitution, and Section 119.11, Florida Statutes.

5. This Court has personal jurisdiction over the Defendant, because the Defendant is a public agency in Collier County.

6. The causes of action in the instant case accrued in Collier County; therefore, this Court is the appropriate venue for the vindication of Plaintiff's civil rights.

The Parties

7. Plaintiff is a Florida citizen who resides in Collier County.

8. Plaintiff is a "person" as that term is used in the Public Records Act. *See* § 119.07(1)(a), Fla. Stat.⁴ and § 1.01(3), Fla. Stat. ("The word "person" includes individuals,

Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. This section specifically includes the legislative, executive, and judicial branches of government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution.

² Note § 119.07(1)(a), Fla. Stat.

Every person who has custody of a public record shall permit the record to be inspected and copied by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public records.

³ Note § 119.11(1), Fla. Stat.

Whenever an action is filed to enforce the provisions of this chapter, the court shall set an immediate hearing, giving the case priority over other pending cases.

⁴ *See* Footnote "2".

children, firms, associations, joint adventures, partnerships, estates, trusts, business trusts, syndicates, fiduciaries, corporations, and all other groups or combinations.”)

9. The Defendant is an “agency” pursuant to Section 119.011(2), Florida Statutes.⁵

10. The Defendant has a duty to permit the inspection, copying, and photography of Defendant’s public records by any person desiring to do so, at a reasonable time, under reasonable conditions, and for reasonable costs⁶. (Emphasis added). *See* § 119.07, Fla. Stat.; Art. I, § 24, Fla. Const.

Florida’s Public Records Act

11. Florida’s Public Records Act implements a right guaranteed to members of the public under the Florida Constitution and it therefore promotes “a state interest of the highest order.” *See NCAA v. Associated Press*, 18 So. 3d 1201, 1212 (1st DCA 2009)⁷.

⁵ Note § 119.011(2), Fla. Stat.

“Agency” means any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law including, for the purposes of this chapter, the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency.

⁶ Note Government-In-The-Sunshine-Manual 2012 Edition, page 144.

The term “reasonable conditions” as used in s. 119.07(1)(a), F.S., “refers not to conditions which must be fulfilled before review is permitted but to reasonable regulations that would permit the custodian of records to protect them from alteration, damage, or destruction and also to ensure that the person reviewing the records is not subjected to physical constraints designed to preclude review.” *Wait v. Florida Power & Light Company*, 372 So. 2d 420, 425 (Fla. 1979). *See also State ex rel. Davis v. McMillan*, 38 So. 666 (Fla. 1905); and *Tribune Company v. Cannella*, 458 So. 2d 1075, 1078 (Fla. 1984), *appeal dismissed sub nom., DePerte v. Tribune Company*, 105 S.Ct. 2315 (1985) (the sole purpose of custodial supervision is to protect the records from alteration, damage, or destruction).

Accordingly, the “reasonable conditions” do not include a rule or condition of inspection which operates to restrict or circumvent a person’s right of access. AGO 75-50. “The courts of this state have invalidated measures which seek to impose any additional burden on those seeking to exercise their rights to obtain records” under Ch. 119, F.S. Inf. Op. to Cook, May 27, 2011. *And see State v. Webb*, 786 So. 2d 602 (Fla. 1st DCA 2001) (requirement that persons with custody of public records allow records to be examined “at any reasonable time, under reasonable conditions” is not unconstitutional as applied to public records custodian who was dilatory in responding to public records requests).

⁷ Note NCAA v. Associated Press, 18 So. 3d 1201, 1212 (1st DCA 2009)

12. The right of access to public records applies to “any public body, officer, or employee of the state, or persons acting on their behalf...” Art. I, § 24, Fla. Const.; *see also* § 119.011(2), Fla. Stat.⁸

13. Under the Public Records Act, “[e]very person who has custody of a public record shall permit the record to be inspected and copied by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public records.” *See* § 119.07(1)(a), Fla. Stat.⁹

14. Under the Public Records Act, “[a]ny person shall have the right of access to public records for the purpose of making photographs of the record...” *See* § 119.07(3)(a), Fla. Stat.¹⁰

15. Defendant, as an agency and custodian of records, has an obligation to provide any non-exempt public records for inspection, copying and photography upon request. *See* § 119.07(1)(a)¹¹, § 119.07(3)(a)¹², Fla. Stat.; Art. I, § 24, Fla. Const.¹³

Factual Background

16. On February 7, 2014 Naples City Desk reporter Gina Edwards, submitted two public records requests via e-mail to the Defendant.

We are not persuaded that the Public Records law has an indirect effect on interstate commerce, but even if some effect had been established, we could not say that the law violates the dormant Commerce Clause. The Public Records law implements a right guaranteed to members of the public under the Florida Constitution and it therefore promotes a state interest of the highest order. The negligible impact the law might have on interstate commerce clearly does not outweigh the goal of ensuring open government.

⁸ *See* Footnote “5”.

⁹ *See* Footnote “2”.

¹⁰ Note § 119.07(3)(a), Fla. Stat.

Any person shall have the right of access to public records for the purpose of making photographs of the record while such record is in the possession, custody, and control of the custodian of public records.

¹¹ *See* Footnote “2”.

¹² *See* Footnote “10”.

¹³ *See* Footnote “1”.

17. Both of the public records requests were submitted for the purpose of obtaining information which Naples City Desk would use to publish news article(s).

18. Specifically, Naples City Desk sought to obtain:

a scanned copy of the 7/18/13 final draft sent by Laflin and any mark-ups or written correspondence in response by Clerk's staff

and,

a scanned copy of the Clerk's Office Internal Audit policies and procedures manual or similar document.

(the "Request"). Said Request is attached hereto and specifically incorporated herein as **Exhibit**

A.

19. On February 11, 2014 Naples City Desk published two stories that include findings critical of Defendant's office related to an audit by Defendant of his former political opponent.

20. Six days after Naples City Desk submitted the Request, on February 13, 2014 Naples City Desk sent another email to Defendant inquiring into the status of the Request.

21. Seven days after receipt of the Request, on February 14, 2014 Defendant sent a letter to Plaintiff an email, stating in relevant part:

The scanned copies of the public records you requested in your Friday, February 7th memo (below) are now available to be picked up at the Clerk's Administrative Offices. The documents and charges are summarized below.

Note: The charges are calculated at \$1.00/ page and the total amount owed must be paid in full upon receipt by cashier's check, personal check or cash, payable to Collier County Clerk of the Circuit Court.

(the "Response"). Said Response is attached hereto and specifically incorporated herein as

Exhibit B.

22. The Response includes an invoice which demands payment of \$556.00 before Naples City Desk may obtain the requested records.

23. Defendant responded with this invoice despite the fact that it had previously produced hundreds of pages of electronic records on CDs for a charge of only \$1.00 per CD to Plaintiff and others.

24. On February 17, 2014 Defendant sent an email to Naples City Desk stating:

Your public records request of February 7th has been completed. The 2 CD's with the documents your requested are now available to picked up [sic] and paid for at the Receptionist Desk of the Clerk's Administrative offices on the 2nd floor of the Courthouse Annex.

25. On February 18, 2014 Naples City Desk sent an email to Defendant expressly disputing the \$556.00 charge and referring Defendant to AGO 85-80, AGO 94-60, The Government in the Sunshine Manual, and other sources.

26. Defendant responded by to the above email by email of even date stating only:

Does this email confirm your refusal to pay the public records charges?

General Allegations

27. Defendant knew that Plaintiff requested the records for the purpose of publishing news article(s).

28. The fee of \$556.00 as stated by Defendant is based upon a charge of \$1.00 per page.

29. Prior to the Plaintiff's publishing of the February 11 stories that were critical of Defendant, Plaintiff had been charged only \$1.00 per CD for scanned documents produced on CD.

30. The records being sought by Plaintiff are public records pursuant to Section

119.011(12)¹⁴, Florida Statutes.

31. The records requested by Plaintiff are maintained by Defendant in his capacity as *ex officio* clerk and accountant of the Board of County Commissioners of Collier County, and/or are public records created by Defendant's office. *See*, § 125.17 Fla. Stat. ("The clerk of the circuit court for the county shall be clerk and accountant of the board of county commissioners. He or she shall keep their minutes and accounts, and perform such other duties as their clerk as the board may direct.")

32. The records requested by Plaintiff are not judicial or official records.

33. The records requested by Plaintiff are subject to the Public Records Act, including the fee provisions of Section 119.07(4).

34. There is no statutory exemption that applies to the requested public records and the Defendant has cited none.

35. Violations of Section 119.07, Florida Statutes constitute an irreparable public injury¹⁵.

36. Plaintiff has a clear legal right to insist upon the performance of the Defendant's duty to permit inspection, copying and photographing of public records.

37. Section 119.11(1), Florida Statutes requires this matter be set for an immediate

¹⁴ Note § 119.011(12), Fla. Stat.

"Public records" means all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.

¹⁵ Note *Daniels v. Bryson*, 548 So. 2d 679, 680 (Fla. 3d DCA 1989)

The impermissible withholding of documents otherwise required to be disclosed constitutes, in and of itself, irreparable injury to the person making the public records request. Since the purpose of Chapter 119 is to afford disclosure of information without delay to any member of the public making a request, nondisclosure prevents access to the information and is an injury not ordinarily compensable in damages.

hearing.¹⁶

38. All conditions precedent to this action have occurred or have been excused or waived.

39. The requested documents are public records that are readily accessible to Defendant.

40. Plaintiff requested the responsive documents be provided in electronic form.

41. Defendant's actions with respect to the public records request discussed herein and in other public record requests made by Plaintiff and other parties, demonstrate a pattern of noncompliance with the Public Records Act and also a likelihood of future violations such that injunctive relief is appropriate.

Count I – Imposition of an Unlawful Fee

42. Plaintiff re-alleges and incorporates by reference paragraphs 1 through 41 as if fully alleged herein.

43. Section 119.07(4), Florida Statutes states that "The custodian of public records shall furnish a copy of the record upon payment of the fee prescribed by law."

44. The Defendant imposed a fee of \$556.00 to produce a copy of the records requested in the Request.

45. The fee of \$556.00 represented 556 pages at \$1.00 per page (there were an additional 36 pages that were not charged).

46. Plaintiff specifically requested that the records be provided in electronic format.

47. The Defendant made it clear that Plaintiff would not be able to receive the requested records until Plaintiff agreed to pay the \$556.00 fee.

48. The Defendant maintains the records in electronic format.

49. The fee of \$556.00 is for records that the Defendant agreed to provide on 2 CDs.

¹⁶ See Footnote "3".

50. Section 119.01(2)(f), Florida Statutes provides, “An agency must provide a copy of the record in the medium requested if the agency maintains the record in that medium.”

51. For electronic records, the agency may only charge the “actual cost of duplication.” *See*, § 119.07(4), Fla. Stat. (2012), Op. Att’y Gen. Fla. 2013-03 (2013).

52. The actual cost of duplication to reproduce the records in electronic format is significantly less than the amount charged by Defendant.

53. Even for hard copies, the Defendant may only charge \$0.15 per copy for these records pursuant to Section 119.07(4)(a)(1) Florida Statutes, not \$1.00 per page.

54. Defendant’s imposition of a fee that exceeds the actual cost of duplication, and also exceeds the fees provided by Section 119.07(4)(a)(1), constitutes a denial of access in violation of the Public Records Act.

Attorneys’ Fees

55. The Public Record Act provides that “[i]f a civil action is filed against an agency to enforce the provisions of this chapter and if the court determines that such agency unlawfully refused to permit a public record to be inspected or copied, the court shall assess and award, against the agency responsible, the reasonable costs of enforcement including reasonable attorneys’ fees.” *See* §119.12, Fla. Stat.

Relief Requested

WHEREFORE, Plaintiff prays this Court:

- (a) Set an immediate hearing pursuant to Section 119.11, Florida Statutes;¹⁷
- (b) Declare that the Defendant’s failure to provide Plaintiff with access to the requested public records was unconstitutional and unlawful under Article I, Section 24 of

¹⁷ *See* Footnote “3”.

the Florida Constitution¹⁸ and the Public Records Act;¹⁹

(c) Order the Defendants to allow the inspection, copying and photographing of the requested records (upon payment of the statutorily authorized fees);

(d) Order the Defendants to provide a copy of the requested records in electronic form.

(e) Enjoin the Defendant from denying access to records which are subject to the Public Records Act;²⁰

(f) Award Plaintiff its reasonable attorney's fees, costs, and expenses incurred in this action, as provided in Section 119.12, Florida Statutes; and

(g) Grant such further relief as the Court deems proper.

¹⁸ See Footnote "1".

¹⁹ See Footnote "2".

²⁰ Note Government-In-The-Sunshine-Manual, page 172.

Injunctive relief may be available upon an appropriate showing for a violation of Ch. 119, F.S. See *Daniels v. Bryson*, 548 So. 2d 679 (Fla. 3d DCA 1989) (injunctive relief appropriate where there is a demonstrated pattern of noncompliance with the Public Records Act, together with a showing of likelihood of future violations; mandamus would not be an adequate remedy since mandamus would not prevent future harm).

Defendant's actions clearly demonstrate the high likelihood, in not the certainty, that such unlawful conduct will continue and the urgent need for injunctive relief from this court.

Dated: February 25 , 2014

Respectfully submitted,

THE O'BOYLE LAW FIRM, P.C.
Attorneys for Plaintiff
1286 West Newport Center Drive
Deerfield Beach, FL 33442
Telephone: (954) 574-6885
Facsimile: (954) 360-0807
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oboylecourtdocs@oboylelawfirm.com

By: /s/ Ryan L. Witmer
Ryan L. Witmer, Esq.
Florida Bar #0107563
rwitmer@oboylelawfirm.com

EXHIBIT A

From: **Gina Edwards** <ginavossedwards@gmail.com>
Date: Fri, Feb 7, 2014 at 11:39 AM
Subject: Re: Follow-Up questions
To: "Robert D. St. Cyr" <Robert.StCyr@collierclerk.com>
Cc: "Ronald S. Dortch" <Ronald.Dortch@collierclerk.com>, "Dale W. Phillips" <Dale.Phillips@collierclerk.com>, "Dwight E. Brock" <Dwight.Brock@collierclerk.com>, "Crystal K. Kinzel" <Crystal.Kinzel@collierclerk.com>, "Sue M. Barbiretti" <Sue.Barbiretti@collierclerk.com>, Barbara Petersen <sunshine@floridafaf.org>, Pat Gleason <pat.gleason@myfloridalegal.com>, "Klatzkow, Jeff" <JeffKlatzkow@colliergov.net>, "Ochs, Leo" <LeoOchs@colliergov.net>

Hi Bob --

Thank you for the opportunity to re-inspect the binders yesterday afternoon on 2/6/14. As we discussed and you noted there were a few sections, mostly older correspondence reflecting conflicts between Barlow and Kinzel, that were not in the scanned material I've been provided. This was in the black un-marked binder that was not part of my initial review on 1/22. I scanned and took what I wanted from that binder.

As discussed, during my inspection of the binders yesterday, I **DID NOT** find a significant number of appraisal reports for when the houses were sold by H.O.M.E.

I remember seeing and noticing these during my initial review on 1/22/14. I noticed them because I saw the granite in the kitchens which caught my eye. I also thought at the time that the pictures would be helpful for my story. I remember there being one for each house, and they were with other material from each house. I thought I flagged all these for copying, but I am not certain and I could be mistaken. This is what I recall from memory. (I recognize there are 3 appraisals for when H.O.M.E. bought houses and these are in the file called "Pay Requests." These are not the appraisals I am talking about. And there was no file called Pay Requests provided on the initial CD of 1/22. I didn't flag these.)

During my review of what your office provided by scan, I noted only appraisals for Clerk's house # 4 and house #1, in with the file called 4_SHIP.pdf and house #1. This is in the folder your office provided called H.O.M.E. Audit Binder #1 & #2. When I saw only two, it prompted me to ask -- where are the rest of these?

In the file called 4_SHIP.pdf, the appraisal from The Appraisal Shoppe for House #4 (1883 48th St SW) is there. Also note the cover page beginning on Page 2 of the document, which lists only the H.O.M.E. buyers (Here house numbers don't correspond). The handwritten note says "a sample" of appraisals was taken. This would reflect only one appraisal from this list.

It makes sense that a "sample" would constitute more than one appraisal from the list initialed by Kearns.

I remain concerned that appraisals showing the rehabbed houses were removed from the clerk's audit work papers following my 1/22 review.

As you recall at the end of my review that afternoon on 1/22, you said I could come back to finish the next morning. I followed up with an email the same day and asked to come back the next morning to finish my inspection. After Clerk's staff examined what I had tagged for copies, the delay of access came.

You replied around 2 p.m. the following day, Thursday 1/23, that you would schedule time "early next week" to allow me to finish my inspection. I responded that same day with my 1/23 email protesting this delay by Mr. Brock's Office.

Mr. Phillips and yourself told me yesterday that no one has removed anything from the binders. Is it possible that someone removed appraisals from the binders after 1/22?

Respectfully, I hope Clerk's staff will review the chain of custody of these binders. Destroying or withholding public records is a serious matter.

I have the following additional questions regarding public records:

1) There were no documents that I could find in the audit work papers that I have reviewed or been given scans of that reflect correspondence leading up to or referencing the decision on 4/23/13 to seek input on or re-open further H.O.M.E. audit work by the Clerk's staff at the BCC meeting? Do these public records exist and why are they not in the audit work papers?

2) An email by CliftonLarsonAllen's Laflin to Kinzel on 7/18/13 with the subject line "final draft" is included in the audit work papers on page 111 of 425 pages in the PDF "Gina Edwards PRR CLA 1.17.14" provided to me. The following page is blank. I could not find a document that appeared to be the "final draft" by Laflin that was sent on 7/18/13 via email. If this was provided, can you clarify what page?

Pursuant to F.S. 119, I request a scanned copy of the 7/18/13 final draft sent by Laflin and any mark-ups or written correspondence in response by Clerk's staff.

I have discussion notes from 7/5 and 7/19.

Additional questions for purposes of the story are these: It looks like Ms. Kearns reviewed appraisals for when the houses were sold. The appraisals appear to document significant remodeling work done. Wouldn't these appraisals -- with photos of the new kitchens and baths etc. -- provide reasonable substantiation that the BCBE work on the invoices was done? Building permits that I reviewed online also show inspection of significant work, like shingle-to-shingle new roofs.

Standards for auditors call for reasonableness in substantiating expenses.

In her February 2012 audit, Ms. Kearns did not raise questions or concerns about substantiating the Boran Craig Barber Engel construction invoices. Unsubstantiated work was a focus Mr. Brock's inflammatory allegations made against BCBE at the public meeting.

- 1) Do the appraisals contradict allegations about work by BCBE not being substantiated?
- 2) Was CliftonLarsonAllen, which relied on documents supplied by the Clerk's Office as part of their consulting assignment, told of or given access to appraisal reports when the houses were sold that were reviewed by Kearns?
- 3) Who does the Clerk's Chief Internal Audit Executive report to?
- 4) Kinzel was directing discussions with CLA and directing changes to methodology on calculating program income, and widening the scope to include conflicts of interest. Does Kinzel oversee the Internal Audit department?
- 5) Does the Clerk's Office follow the "Yellow Book" industry standards and guidelines for government auditors?
- 6) Does the Clerk's Office have written policies and procedures for audits that govern legal and ethical requirements, initiation or continuance of audits, standards for quality control and assurance, and standards for independence as suggested by the Yellow Book?

Pursuant to F.S. 119, I request a scanned copy of the Clerk's Office Internal Audit policies and procedures manual or similar document.

Please feel free to call me or contact me regarding these questions if you choose to grant an interview and respond. As previously stated, I believe discussing these questions in an interview format is best for source and journalist.

Respectfully,

Gina Edwards
Watchdog City Press reporter

Naples City Desk available on
watchdogcity.com

[239-514-1336](tel:239-514-1336)
[239-293-3640](tel:239-293-3640)

EXHIBIT B

From: **Robert D. St. Cyr** <Robert.StCyr@collierclerk.com>

Date: Fri, Feb 14, 2014 at 12:01 PM

Subject: Your public records request is available for you to pick up

To: Gina Edwards <ginavossedwards@gmail.com>

Cc: "Ronald S. Dortch" <Ronald.Dortch@collierclerk.com>, "Dale W. Phillips" <Dale.Phillips@collierclerk.com>, "Dwight E. Brock" <Dwight.Brock@collierclerk.com>, "Crystal K. Kinzel" <Crystal.Kinzel@collierclerk.com>, "Sue M. Barbiretti" <Sue.Barbiretti@collierclerk.com>

Gina,

The scanned copies of the public records you requested in your Friday, February 7th memo (below) are now available to be picked up at the Clerk's Administrative Offices. The documents and charges are summarized below.

Note: The charges are calculated at \$1.00/ page and the total amount owed must be paid in full upon receipt by cashier's check, personal check or cash, payable to Collier County Clerk of the Circuit Court.

Public records requested On February 7th :

1. Pursuant to F.S. 119, I request a scanned copy of the 7/18/13 final draft sent by Laflin and any mark-ups or written correspondence in response by Clerk's staff.
2. Pursuant to F.S. 119, I request a scanned copy of the Clerk's Office Internal Audit policies and procedures manual or similar document.

INVOICE :

Summary of amount owed for scanned documents :

Laflin email correspondence as referenced above (350 pages)
Clerk's Internal Audit policies and procedures (206 pages) = \$206

Total Amount Owed	\$ 556.00	Total Amount
Paid	Date	

Signed _____

This fulfills your public record request in the February 7, 2014 11:39 am email.

With respect to your latest public records request in the February 13, 2014 3:08 pm email, I will respond in a reasonable period of time.

Regards,

Bob St. Cyr , Director of Community Outreach, Clerk of Courts